

INTUITION, MORALS, AND THE LEGAL CONVERSATION ABOUT GAY RIGHTS

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When lawyers and judges converse in litigation, factual and legal analysis typically takes center stage. Yet, when the legal conversation¹ turns to the rights of lesbians, gay men, and bisexuals,² the ground shifts. Intuition

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1. By legal conversation, I mean to encompass both the arguments made by lawyers in litigation and the court's adjudication of those claims.

Although this essay focuses on litigation, similar questions arise regarding arguments made in the legislative arena and in political discourse more generally. Kent Greenawalt offers thoughtful explorations in two books, with a particular focus on the legitimacy of religious convictions in law-related political discourse. See KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); see also Kathleen M. McGraw, *Manipulating Public Opinion with Moral Justification*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 129 (1998) (observing the effectiveness of moral claims in shaping public opinion and the difficulty of detecting deceptive use of these kinds of claims).

2. Actually, legal discussions rarely turn to questions specifically related to bisexuals. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 359 (2000).

Many of the points made in this essay are also relevant to legal conversations about the rights of transgender individuals, although this essay's limited scope precludes development of that analysis here. Likewise, many of the points here may be relevant to legal conversations about abortion, where intuition and moral judgment have often similarly displaced reasoned analysis. In *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007), for example, the U.S. Supreme Court incorporated its own, non-evidence-based views about abortion's effect on women in sustaining the federal "Partial-Birth Abortion Ban Act of 2003." The Court wrote:

While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . The State has an interest in ensuring so grave a choice is well informed.

Id. at 1634 (emphasis added). On the use of this type of argument in abortion jurisprudence and political rhetoric, see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, DUKE L.J. (forthcoming 2008).

and morals rationales often displace evidence-based reasoning.³ More specifically, arguments to limit the rights of lesbians and gay men tend to depend explicitly on intuition,⁴ and sometimes morality,⁵ in ways that contemporary arguments to restrict the rights of other social groups⁶ rarely do.⁷

In addressing this dissonance, this essay has two central aims. The first is simply to observe the disproportionate openness to arguments based on intuition and morals in legal conversation regarding gay rights, particularly in equal protection litigation.⁸ The second is to consider some of the func-

3. Some commentators have described more generally a “gay exception” to constitutional doctrine and family law rules. See Tobias Barrington Wolff, *Political Representation and Accountability Under Don’t Ask, Don’t Tell*, 89 IOWA L. REV. 1633, 1710 & n.319 (2004) (citing discussions identifying “gay exceptions” to the ordinary application of settled rules).

4. In this essay, I use the word intuition in its ordinary, dictionary-definition sense, meaning a “knowing or sensing without the use of rational processes” or, put another way, “[a] sense of something not evident or deducible.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 947 (3d ed. 1992). At later points in the essay, I also refer to “unprovable assumptions” to mean essentially the same thing. See *infra* note 51 and accompanying text. The essential shared trait is the impossibility of marshalling support that would satisfy ordinary evidentiary rules.

5. By morals-based justifications, I mean to include only rationales that rely explicitly on morality as a justification for government action as distinct from the larger number of arguments and analyses that may have morality-based underpinnings. A paradigmatic example of the morals justifications I focus on here is *Bowers v. Hardwick*, in which the majority relied on “the presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable” to sustain Georgia’s sodomy law. 478 U.S. 186, 196 (1986). In *Lawrence v. Texas*, the Court rejected this reasoning, holding that “‘the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.’” 539 U.S. 558, 577 (2003) (citation omitted). Although we see less explicit reliance on morals rationales post-*Lawrence*, I include reference to morals-based justifications in this essay both because they continue to appear in some cases involving lesbians and gay men, and because they share many of the troubling features that are associated with intuition-based arguments. For an example of morals-based reasoning in a post-*Lawrence* case, see *State v. Limon*, 83 P.3d 229, 375, 383 (Kan. Ct. App. 2004) (holding that state interest in “prevent[ing] the gradual deterioration of . . . sexual morality” justified more burdensome age-of-consent rules for same-sex than different-sex couples). I have addressed morals-based justifications in greater detail elsewhere. See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004) [hereinafter Goldberg, *Morals-Based Justifications*].

6. Asylum law context provides a useful definition of social group for the purposes of this essay. See, e.g., *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (defining “particular social group” category to include individuals of “similar background, habits, or social status”) (citation omitted).

7. To be clear, the point here is a comparative one—that gay and lesbian rights cases have a relatively high concentration of these arguments—and not a claim that these arguments always appear in gay rights cases or never appear in other cases. Cf. *supra* note 2.

8. Again, my focus here is on contexts in which intuitions play an explicit role in justifying government action rather than on contexts where intuitions may underlie arguments or

tions and consequences of intuition-based arguments in legal conversations more generally. I concentrate primarily on intuition-based arguments because they are the focus of scholarly inquiry less often than morals arguments, although I address morals-based arguments as well.

I begin by sketching the work that intuitions do in sexual orientation cases. Against this backdrop, I propose that the explicit proffer of intuitions and moral claims as rationales for government action in cases involving the rights of lesbians and gay men, while pleasingly transparent, also raises troubling problems for legal decision-makers. Finally, I offer some brief thoughts as to why intuition- and morals-based arguments are so freely made in connection with challenges to sexual orientation-based distinctions, when references to similar intuitions and moral views would not typically appear in conversations about other types of government action.

I.

Our first task is to consider the work of intuition rationales in sexual orientation cases. Although any constitutional law student knows that the rationales function in constitutional adjudication as justifications for government action, I discuss the background law here briefly to highlight the contrast between the justifications offered in sexual orientation and other types of cases.

The requirement that governments justify their acts arises everywhere in constitutional law, whether the acts involve treatment of enemy combatants,⁹ punishment of students for unfurling a “Bong Hits for Jesus” banner,¹⁰ or anything in between. In the equal protection context, in particular, govern-

judicial reasoning but remain unmentioned. There is an extensive literature addressing questions of intuition and adjudication more generally. See, e.g., Chris Gunthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007) (proposing a model “[s]upported by contemporary psychological research on the human mind and [the authors’] empirical evidence” which posits that “judges generally make intuitive decisions but sometimes override their intuition with deliberation”); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929) (discussing the use of “hunches” in judicial decisionmaking); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1063–68 (2006) (discussing “the role of the personal, the emotional, and the intuitive” in judicial decisionmaking); R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1384 (2006) (concluding that “intuition is invariably central—whether overtly so or not—to the process of arriving at a judicial outcome by any standard recognized means”).

9. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2003).

10. See *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

ments must legitimize their decisions to draw the challenged classifications.¹¹ Explanations for line-drawing must be given when courts are deciding, for example, whether a public university can exclude women from admission¹² or whether the state can maintain different rules regarding involuntary institutionalization for people with mental retardation and mental illness.¹³

At this general level, equal protection's demand for justification of government action related to sexual orientation is, of course, no different. Questions regarding a government's authority to deny same-sex couples the right to marry or to allow or forbid gay adults from adopting children, for example, are all variations on the standard constitutional inquiry into a government's authority to impose a limitation on the rights of some, but not others.

When these questions arise, standard principles of constitutional adjudication require us to look to the text of the Constitution's equal treatment guarantees¹⁴ and to cases interpreting that text. Most fundamentally, we ask whether the government has supplied a good enough justification for its action.¹⁵ What qualifies as "good enough" depends on what the government is doing and against whom it is acting.¹⁶ Under current constitutional doctrine, restricting rights based on a person's race or sex requires a fairly weighty rationale.¹⁷ By contrast, the hurdle a government must surmount before re-

11. In some circumstances, governments need not themselves produce the legitimizing justification. *See* *Heller v. Doe*, 509 U.S. 312, 320 (1993) ("[A] legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.'" (citation omitted)). *See also infra* note 47 and accompanying text.

12. *See* *United States v. Virginia*, 518 U.S. 515, 519 (1996).

13. *See* *Heller*, 509 U.S. at 314–15.

14. *See* U.S. CONST. art. V; *id.* amend. XIV, § 1. Although the Equal Protection Clause is the central repository of constitutional equal treatment jurisprudence, cases applying due process guarantees also frequently bear on equality questions. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003). *Compare, e.g.*, *Goldberg v. Kelley*, 397 U.S. 254 (1970) (finding due process protections require pre-termination hearing for public assistance recipients), *with* *Mathews v. Eldridge*, 424 U.S. 319 (1976) (rejecting due process claim for re-termination hearing for disability benefits recipients).

15. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985) (stating that all legislation must, at a minimum, be "rationally related a legitimate state interest" and that some legislative classifications call for heightened judicial scrutiny).

16. Elsewhere, I have argued that the traditional separation of equal protection review into three distinct tiers serves as a barrier to equality and meaningful analysis. *See generally* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 515 (2004) [hereinafter *Goldberg, Equality Without Tiers*].

17. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 328–30 (2003) (applying strict scrutiny to law school's consideration of race in affirmative action plan); *Virginia*, 518 U.S. at 532–33 (requiring the state to proffer an "exceedingly persuasive" interest to justify a sex-based classification); *City of Cleburne*, 473 U.S. at 440–41 (explaining that strict scrutiny applies to

stricting the rights of most social group members, including the elderly, the young, the disabled, and gay people, tends to be rather easier to overcome.¹⁸ According to the weakest version of this review standard, any reasonably conceivable justification will do.¹⁹

Ultimately, though, whether the standard is one of strict scrutiny or rational basis review, the bottom line question in any constitutional equal treatment challenge is the same: Does the government have a permissible justification for its action?²⁰

II.

It turns out, however, that although the core question regarding government rationales remains the same for classifications involving different types of social groups, the conceptualization of “permissible” reasons—how we think about which reasons are legitimate and sufficient and which are not—often looks different in sexual orientation cases than in others.²¹

In the usual case, the government characterizes its restriction on an individual or group member as necessary to prevent a demonstrable harm. For

statutes “classif[y]ing by race, alienage, or national origin” and that “heightened” scrutiny applies to “classifications based on gender”).

18. See, e.g., *Heller*, 509 U.S. at 320–21 (upholding a distinction between mentally ill and mentally disabled individuals under rational basis review); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (sustaining mandatory retirement statute under rational basis review); cf. *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (applying rational basis review to state constitutional amendment that classified based on sexual orientation and invalidating the amendment because animus, rather than a legitimate government interest, explained the state’s distinction). But see *In re Marriage Cases*, No. S147999, 2008 WL 2051892, at *45 (Cal. May 15, 2008) (holding that sexual orientation-based classifications should be subjected to strict scrutiny under the California Constitution’s equal protection clause).

19. *Heller*, 509 U.S. at 320 (“[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”) (internal quotation omitted). At times, however, even low-level, rational basis review is applied with some degree of rigor. See, e.g., *Romer*, 517 U.S. 620 (invalidating state amendment notwithstanding application of rational basis review); see also *Lawrence v. Texas*, 539 U.S. 558, 580–83 (2003) (O’Connor, J., concurring) (explaining that criminal law imposing penalties on same-sex but not different-sex couples violated the Equal Protection Clause); Goldberg, *Equality Without Tiers*, *supra* note 16, at 514–17 (discussing additional weight added to minimal rational basis requirements in some “strong” rational basis cases).

20. See, e.g., Goldberg, *Equality Without Tiers*, *supra* note 16, at 533.

21. For an illustrative list of cases in which courts have rested decisions in sexual orientation cases on intuition- or morals-based frameworks, see *infra* note 30. Again, I do not suggest that this approach appears in all sexual orientation cases but instead that advocates and courts that make arguments to sustain sexual orientation discrimination are unusually likely to deploy this type of reasoning.

example, the argument goes, national security depends on restricting the rights of enemy combatants.²² Or a school argues that its educational mission will be undermined if it cannot punish the “bong hit” banner-waver.²³ Simply put, the government identifies some demonstrable need that it aims to serve by whatever action it has taken. A related premise of the argument is that something particular about the burdened group—enemy combatants or high school students in the illustrations here—justifies restricting members of those groups but not others.

In the kinds of cases that we think of as classic individual rights cases involving discrimination based on an aspect of individual identity, courts also typically focus on a demonstrable fact about the group that justifies the restriction on group members’ rights. When the United States Supreme Court sustained different involuntary institutionalization rules for people with mental retardation and mental illness, for example, the Court cited factual differences between the two groups to support the differential treatment.²⁴ The Court similarly looked to the fact that only women can give birth when considering whether to sustain immigration sponsorship rules that are more onerous for fathers than mothers.²⁵

To be clear, I am not suggesting that these “demonstrable fact” arguments always succeed. For example, when Virginia argued that it could exclude women from its military training institute because the school’s adversative training method was better suited to men than women, the Supreme Court rejected the argument as flawed and impermissibly stereotyping.²⁶ Nor am I suggesting that the assertion of factual difference should be enough to justify a state-sponsored classification. As Justice O’Connor observed in her dissent in *Nguyen v. INS*, the fact that women can give birth to children cannot, without more, explain why the government treats mothers as more likely to inculcate American citizenship values than fathers.²⁷

Whether or not we agree that these empirical distinctions justify a governmental restriction in any particular case is not my concern here, however. Instead, the point is simply that when a government seeks to restrict the rights of one group of people relative to others, the focus tends to be on whether demonstrable differences exist between the burdened group and

22. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

23. See *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

24. *Heller*, 509 U.S. at 321–29.

25. *Nguyen v. INS*, 533 U.S. 53, 62 (2001).

26. *United States v. Virginia*, 518 U.S. 515, 520–23, 558 (1996).

27. *Nguyen*, 533 U.S. at 79–83 (O’Connor, J., dissenting).

others sufficient to justify the burden being challenged.²⁸ So, returning to the high school students and enemy combatants for a moment, the discussion turns, at least in part, on demonstrable features or attributes associated with the relevant population—whether it is a susceptibility to being distracted in the case of high school students, or a heightened risk to the interests of the United States thought to be posed by enemy combatants. The legal conversation in these cases is about facts that are arguably related to the group and about the connection between those facts and the need for the governmental restriction.

When it comes to restrictions on the rights of lesbians and gay men, however, the conversation and analysis tend to be different. The rationale for the government treating gay people differently from others for purposes of marriage, the military, adoption, or anything else is not, except in the outlier case, tied to a feature that makes gay people demonstrably different from non-gay people. More specifically, the focus of courts and governments is not typically on physical differences, educational differences, or differences in mental health. Even the once-favored argument that gay people are more likely than others to be sexual predators no longer gets much traction in legal or, indeed, popular conversation.²⁹

Instead of arguing that demonstrable differences exist, the claim, made by both advocates and judges, is often that intuition or morality, or both in some cases, are enough to justify treating gay people differently from everyone else.³⁰ Put most simply, the argument is that “our” shared intuition or

28. See, e.g., *Nguyen*, 533 U.S. at 77 (O’Connor, J., dissenting); *Virginia*, 518 U.S. at 533; see also *Heller*, 509 U.S. at 321 (noting that the state “has proffered more than adequate justifications for the differences in treatment between the mentally retarded and the mentally ill”).

29. See Gregory M. Herek, Facts About Homosexuality and Child Molestation, http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html (last visited June 3, 2008).

30. See, e.g., *Lofton v. Sec’y of Dep’t of Children & Family Servs. (Lofton I)*, 358 F.3d 804, 819–20 (11th Cir. 2004) (relying on “unprovable assumptions” about parenting to sustain Florida’s bar on gay adults from adopting children); *State v. Limon*, 83 P.3d 229, 236 (Kan. Ct. App. 2004) (finding that “the legislature could have reasonably determined that” an age-of-consent statute that imposed greater punishment on same-sex than different-sex couples could help “prevent the gradual deterioration of the sexual morality approved by a majority of Kansas”) *rev’d*, 122 P.3d 22 (Kan. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (relying on “[i]ntuition and experience” regarding childrearing to sustain the state’s exclusion of same-sex couples from marriage). In other cases where the language of intuition and unprovable assumption is not used explicitly, courts have embraced rationales that rest on similar intuitions. See, e.g., *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality opinion) (sustaining Washington’s ban on same-sex couples’ marrying in part because “children *tend to thrive*” in a “‘traditional’ nuclear family”) (emphasis added); cf. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 999–1000 (Mass. 2003) (Cordy, J., dissenting) (finding the state legislature could have rationally concluded that “married opposite-sex parents”

life experience shows that being gay is not as desirable, morally preferable, or good for society as not being gay. These intuitions or moral commitments, the argument concludes, suffice to support official distinctions between gay and non-gay people. Some describe this as “heteronormativity” to convey the idea that the social norm is heterosexual and that anything other than heterosexuality involves a non-neutral, negative deviation.³¹

While this intuition or preference for heterosexuality undoubtedly plays a powerful role in social conversation among individuals and within many communities, the aim here is to capture its role in *legal* conversation. So, we might ask, if the government has to point to a difference between gay and non-gay people to justify its sexual orientation-based distinctions between constituents, what are the available options, other than intuition?

There’s the rub, at least for government lawyers and courts that would uphold these classifications. As just noted, unlike for some other social groups, sexual orientation gives rise to no known differences in physical capacity, intellectual ability, and mental health.³² There are also no credible

are “the optimal social structure in which to bear children” and that same-sex couples “present[] an alternative structure for child rearing that has not yet proved itself”).

31. Linda C. McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63, 74–75 (2006); see also Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 184 (2001). For discussion of sex stereotyping embedded in some of these intuition-based rationales, see generally Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

32. At one time, homosexuality was considered a psychiatric disorder among mental health experts, but in 1973 the American Psychiatric Association (APA) voted unanimously to remove homosexuality as a disorder from the Diagnostic and Statistical Manual’s (DSM) section on Sexual Deviancy. John Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 116 (1991). A year later, a majority of the general APA membership confirmed this decision, voting to replace the diagnosis with a milder category of sexual orientation disturbance. The DSM-III, in turn, replaced this diagnosis with “ego-dystonic homosexuality,” which was deleted in 1986 in the DSM-III-R. Gregory M. Herek, *Facts About Homosexuality and Mental Health*, http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html (last visited June 3, 2008). The APA now classifies “persistent and marked distress about [one’s] sexual orientation” under “Sexual Disorders Not Otherwise Specified.” AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 582 (4th ed. 2000).

This shift has been followed in many parts of the world, including the British Government in 1994, the Ministry of Health in the Russian Federation in 1999, and the Chinese Society of Psychiatry in 2001. See Michael Kirby, *The 1973 Deletion of Homosexuality as a Psychiatric Disorder: 30 Years on*, 37 AUSTL. & N.Z. J. PSYCHIATRY 674, 675 (2003); Nigel Warner, *The Russian Federation Has Dropped “Homosexual Orientation” from Its New Classification of Mental and Behaviour Disorders*, ILGA EUROLETTER 75, Nov. 1999, <http://www.france.qrd.org/assocs/ilga/euroletter/75.html>; John Balzano, *Toward a Gay-*

studies showing that sexual orientation affects a person's ability to parent or raise an emotionally and physically healthy child.³³ Indeed, the American Academy of Pediatrics has taken the position that sexual orientation is not a relevant determinant of parenting ability, and has opposed governmental distinctions between gay and non-gay parents and prospective parents.³⁴

The dearth of factual evidence to support distinctions between gay and non-gay people thus poses a challenge both for governments and courts that would prefer to sustain sexual orientation-based distinctions, whether in marriage, adoption, the military, or other contexts. What is a judge or government lawyer to do? This is where arguments based on intuition and morality come in—they fill the gap left by the absence of demonstrable and relevant factual differences related to sexual orientation.

Consider for example, the Eleventh Circuit's decision sustaining Florida's ban on adoption by gay adults.³⁵ Two rationales played a prominent role. First, the court embraced Florida's contention that it could restrict adoption to heterosexuals because "the marital family structure is more stable than other household arrangements."³⁶ And, second, the court agreed with Florida "that children benefit from the presence of both a father and mother in the home."³⁷

Turning first briefly to the marital stability point,³⁸ two flaws bear noting. For one, no reputable support exists for the court's proposition that mar-

Friendly China?: Legal Implications for Gays and Lesbians, 16 LAW & SEXUALITY 1, 36 (2007). At the supranational level, the World Health Organization has not classified homosexuality as a mental illness since the early 1990s. See WORLD HEALTH ORG., INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES & RELATED HEALTH PROBLEMS V (10th rev. 2007), available at <http://www.who.int/classifications/apps/icd/icd10online/>.

33. See E.C. PERRIN, SEXUAL ORIENTATION IN CHILD AND ADOLESCENT HEALTH 110–30 (2002) (reviewing studies and finding no material disparities in mental health and social adjustment between children of gay and non-gay parents); Melanie A. Gold et al., *Children of Gay or Lesbian Parents*, 15 PEDIATRICS IN REV. 354, 357 (1994) ("There are no data to suggest that children who have gay or lesbian parents are different in any aspects of psychological, social, and sexual development from children in heterosexual families."); see also Brief for Am. Psychol. Ass'n et al. as Amici Curiae Supporting Plaintiffs-Respondents at 36, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 86), 2006 WL 1930166; Brief for Child Rights Orgs. as Amicus Curiae Supporting Respondents at 11, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (No. 75934-1), 2006 Wash. LEXIS 598.

34. Am. Acad. of Pediatrics, *Co-parent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339 (2002).

35. *Lofton I*, 358 F.3d 804.

36. *Id.* at 819.

37. *Id.*

38. Although the court in *Lofton I* acknowledged the marital stability argument, it focused primarily on the mother/father claim. *Id.* (describing the state's interest in "plac[ing] adoptive children in homes that have both a mother and father" as more important).

ried mothers and fathers have more stable relationships than partnered mothers and mothers or fathers and fathers. All of the credible studies showing the relative stability of marital relationships when children are in the home encompass only heterosexual couples.³⁹ At most, those studies demonstrate that couples that have the option to marry and choose not to marry are less likely to stay together than those that marry. However, for same-sex couples that lack that option, studies comparing the duration of heterosexual relationships do not provide accurate comparative information. Second, the marital stability rationale begs the question whether the state can justify one discriminatory rule, the adoption law, by pointing to another discriminatory rule, the marriage law.⁴⁰

The *Lofton* court's disregard of the serious weaknesses in its reasoning can be explained, I believe, by the court's strong sense—we can call it intuition—that marriage really does hold families together, at least more so than non-marital commitments. The power of that intuition led the court to disregard both the facts and the law just mentioned, which, if given a fair hearing, would have rendered the state's marital stability argument untenable.

The court's response to the state's childrearing rationale, which the court characterized as even “[m]ore important[.]”⁴¹ than the marital stability claim, was even more misplaced as a result of the court's deference to intuition. First, the constitutional question in the case was not, as the court put it, whether children do well with a mother and father in the home.⁴² That determination, which amounts to a choice among policy preferences, falls classically within the legislature's domain. Children, after all, do well with many things: more money, better education, more loving, committed, and capable parents.

The proper approach in this case would have been, instead, to apply the run-of-the-mill equal protection inquiry to the classification at issue: Can the

39. See, e.g., Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607 (2006); see also Brief of the Am. Psychol. Ass'n et al. as Amici Curiae in Support of Plaintiffs-Appellees, *Conaway v. Deane*, 903 A.2d 416 (Md. 2006) (No. 44) (mem.), available at <http://www.aclu.org/lgbt/relationships/272531gl20061019.html>; L.A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. MARRIAGE & FAM. 880 (2004).

40. Because this question does not bear on this essay's intuition-based argument point, I will simply note it here rather than discussing it in full. For further discussion of this point, see, for example, Vanessa A. Lavelly, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 252 (2007).

41. *Lofton I*, 358 F.3d at 819.

42. See *id.* at 819–20.

state legitimately choose sexual orientation as a basis on which to distinguish between prospective adoptive parents?

If it were true, counterfactually, that sexual orientation was relevant to parenting ability and that gay adults posed a particular danger to children, the analysis would have been easy. The danger could have reasonably explained the state's exclusion of gay people from the pool of prospective adoptive parents. But because no factual support exists for the proposition that an individual's sexual orientation correlates either positively or negatively with parenting ability, the state and the court had to look elsewhere.

In the absence of persuasive facts, the state contended that children "benefit" from the presence of a male and female parent, and the court accepted that argument as a sufficient justification for the adoption law's sexual orientation-based line.⁴³ And here lie the analytic errors. Most basically, stating that different-sex parents confer a particular benefit does not, in itself, show that same-sex parents do not confer either the same benefit or another that is equally important.⁴⁴

But even if we infer, as intended by the state, that different-sex parents provide a benefit not provided by same-sex parents,⁴⁵ we have restated, but not responded to, the equal protection inquiry. That is, the adoption law itself states that the government prefers adoptive parents to be heterosexual rather than gay.⁴⁶ Equal protection requires something more than repetition of those preferences. Government must, at a minimum, have a legitimate explanation for *why* it drew the challenged line.⁴⁷ If it does not, equal protection review would be effectively meaningless because a state could always justify its distinction between two groups of people by stating that group A offers benefits that group B does not—or more simply, that it prefers group A to group B and has, therefore, drawn a line between them.⁴⁸ Something more than mere reiteration of the classification is required.⁴⁹

What, then, is the equal protection-sanctioned *explanation* for why Florida can constitutionally prefer straight adults to gay adults when deciding who can adopt? The Eleventh Circuit sought to fill that gap, but lacking demonstrable evidence of differences between gay and non-gay parents, as

43. *Id.* at 819.

44. *See* Lofton v. Sec'y of Dep't. of Children & Family Servs. (*Lofton II*), 377 F.3d 1275, 1297-1301 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

45. *Lofton I*, 358 F.3d at 820.

46. FLA. STAT. § 63.042(c)(3) (2007); *Lofton I*, 358 F.3d at 806-07.

47. *See* Romer v. Evans, 517 U.S. 620, 633 (1996) (stating that classifications must "bear a rational relationship to an independent and legitimate legislative end").

48. *See id.* at 632-33.

49. *See id.* at 632 (ruling that "the link between classification and objective gives substance to the Equal Protection Clause").

noted above, it invoked intuition instead.⁵⁰ The state's premise, the court wrote, was "one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action."⁵¹ It added that "[a]lthough social theorists from Plato to Simone de Beauvoir have proposed alternative childrearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model."⁵² "Against this 'sum of experience,'" the court concluded, "it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother."⁵³

Before turning to the merits of this reasoning, I want first to make a simple, descriptive observation. In most cases, as discussed earlier, parties and courts do not rest decisions explicitly or exclusively on intuitions, unprovable assumptions, moral judgments, or similar rationales that are not susceptible to ordinary methods of proof. It is difficult even to imagine a court opining that "we have no real evidence for limiting the rights of group B—but we have our intuition, based on history, that limiting group B's rights is rational and permissible." Or that "we have no evidence to show that the relationships of A couples and B couples are different in their day-to-day existence, but we know that there is a moral or commonsense difference between them, and that difference justifies granting more rights to A couples than B couples." Yet, in *Lofton v. Secretary of the Department of Children and Family Services*⁵⁴ and numerous other sexual orientation-related cases,⁵⁵ the opposite is true. Courts in these cases proceed as though they are free from the norms of legal conversation that lead them to offer evidence-based, accessible reasoning in other kinds of cases.

50. *Lofton I*, 358 F.3d at 819–20.

51. *Id.* (emphasis added). The court cited *Paris Adult Theatre I v. Slaton* to support the "unprovable assumption" proposition. *Id.*; see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62–63 (1973). *Paris*, however, did not rest its decision solely on "unprovable assumptions" but instead pointed to public safety and health rationales to support its ruling sustaining Indiana's nude-dancing ban. 413 U.S. at 58, 61, 63 (referring to reports of "an arguable correlation between obscene material and crime" and noting the "social interest in order," and describing that interest as a concern with "antisocial behavior" that might flow from the "crass commercial exploitation of sex"). For further discussion of the limitations of *Paris Adult Theatre I* on this point, see generally Goldberg, *Morals-Based Justifications*, *supra* note 5, at 1269–70.

52. *Lofton I*, 358 F.3d at 820 (citing PLATO, THE REPUBLIC, Bk. V, 459d–461e; SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley trans., Vintage Books 1989) (1949)).

53. *Id.* at 820 (quoting *Paris Adult Theater I*, 413 U.S. at 63).

54. *Lofton I*, 358 F.3d 804.

55. See *supra* note 30.

My point is not that moral concerns, and unprovable assumptions and intuitions are absent from government action and judicial reasoning. Surely they are present regularly and perhaps even inevitably, at least to the extent they shape individuals' capacity to understand and interpret information.⁵⁶ My point, instead, is that those concerns, assumptions, and intuitions are not typically the major—and almost never the sole—stated factor in legal conversation about what a government can or cannot do. Yet, in cases involving sexual orientation-based distinctions, we see that governments and courts advance these types of reasons explicitly.⁵⁷ This move begs the question whether references to intuition or morals are constitutionally sufficient, without more, to support state-sponsored distinctions between social groups.

III.

Even if we agree that moral commitments, intuitions, and unprovable assumptions play an unusually strong role in legislative and judicial analysis related to sexual orientation, we need not necessarily conclude that this role should be cause for concern. Some would argue that the overt presence of intuition- and morals-based arguments is the sign of a healthy decision-making process, given what we know about how decision-makers use empirical evidence to justify decisions that were *really* made based on intuitive or moral priors.⁵⁸ Indeed, the argument could be made that the legal conversation around gay and lesbian rights should be emulated in other subject areas because it is more honest than most other public policy and law-related conversations.

To take the point a step further, some would argue that reliance on intuition is precisely within the domain of states. If the Constitution ties the government's hands from acting on intuitions or moral views about what is good for the populace, some would say we deserve the state and its constituents. Lord Devlin sought to shore up this point by maintaining that society would

56. For discussion of the ways in which cognitive biases shape information processing more generally, see, for example, David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, in *THE NEW ECONOMICS OF HUMAN BEHAVIOR* 188 (Mariano Tomassi & Kathryn Ieruli eds., 1995). Also see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995), for a review of the effects of cognitive biases on individuals' interpretation of information.

57. See, e.g., *Lofton I*, 358 F.3d at 819–20.

58. See generally Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 *COLUM. L. REV.* 1955 (2006) (discussing the ways in which courts rely on facts to stand in for normative judgments about social groups).

“disintegrate” if basic moral norms went unenforced.⁵⁹ In this vein, some argue that if we do not allow the government to safeguard the populace’s moral well-being—by either reserving marriage to heterosexuals or barring gay people from adopting—we are endangering our community’s well-being as much as if we prevent the government from developing licensing standards for teachers or punishing people who write graffiti on buildings, drive through stop signs, or commit violent acts. How, these advocates might ask, can we have a government that cares only about insuring our physical well-being and protecting our property, when so much of what makes for a good society is the society’s moral health?

Yet, much as honesty might be desirable as general policy, honesty alone does not convert intuition and moral commitments into credible legal arguments. The problem, broadly put, is that rationales and decisions based on intuitions and moral values are not contestable.⁶⁰ Either you agree or you do not, and even examples and evidence that undermine the proffered intuition or moral position cannot provide conclusive disproof. When my morals and intuitions are pitted against yours, what, really, can an adjudicator do? One person’s claim that her intuitions and moral commitments require Florida’s legislature to bar same-sex couples from marriage leaves the decision-maker with no more basis for a reasoned determination than another’s assertion that her moral commitments and intuitions mandate the converse result.

While this tension between competing intuitions and moral positions may make for engaging social conversation, its centrality in legal conversations about gay and lesbian rights raises serious concerns for courts. Faced with a government’s intuition-based rationales and moral claims, courts have three choices, none of which is ideal: 1) they can accept the assertions as reflective of majoritarian sentiment; 2) they can accept the assertions because they share them and find them to be correct; or 3) they can disagree with the assertions and reject them.⁶¹ Yet embracing majoritarianism elides the important judicial screening function to insure that the intuitions are not merely stand-ins for bias.⁶² And making independent judgments about the intuitions—whether for or against—runs the risk that courts will appear to be (or actually will be) substituting their own preferences for those of the majority.

59. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 13 (1965).

60. I develop this point at length in Goldberg, *Morals-Based Justifications*, *supra* note 5.

61. An additional option might be to categorically reject any rationale that relies explicitly on intuition without considering the argument’s merits.

62. See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (stating that the obligation of courts conducting equal protection review is to “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law”).

Legal realists and critical theorists might say that this description does no more than track the usual way in which outcome-oriented courts work. But, even if that is the case, we ought still take note of the effect that open reliance on intuition and morals has on the decision-making process.

In the usual case, we expect some evidentiary support to justify the state's actions. We expect, for example, to hear about national security needs, effective school disciplinary practices, public health, or sound educational or economic theory. Then, in our legal conversation, we can agree or disagree with the proffered evidence by critiquing the methodology, the authors' biases, or the analysis.

But, when ordinary norms of legal argument give way to intuition and moral judgments, without even the expectation of demonstrable evidence, the possibilities for rigorous contestation of the government's interests drop off sharply. With this drop comes a substantially increased risk that courts will substitute majoritarian preferences for meaningful legal analysis, and that those in disagreement will be able to do little, at least in litigation, to overcome the intuitions and moral judgments that have been deemed decisive.

IV.

Finally, two closing thoughts on why sexual orientation-related legal conversations are so often dominated by intuition when others are not.

First, longstanding biases tend to remain strong even in the face of contravening evidence. To elaborate briefly, individuals who hold biases toward a social group frequently see the disliked or feared group as deficient in some demonstrable, factual way. Consider, for example, the demonization of Jews in Nazi Germany and the dehumanization of African and African-American slaves in the United States.⁶³ Powerful cartoons and stories portrayed members of those groups as sexual predators, disloyal, untrustworthy, and general menaces to society.⁶⁴ We can see this as well in depictions of lesbians and gay men in the past century as mentally ill, sexually predatory, and otherwise unfit to participate in society.⁶⁵ As the "facts" about Jews and African Americans gave way in the face of reality, so too have the similar "facts"

63. See *Colored Citizenship*, N.Y. TIMES, Feb. 15, 1860, at 2; see also *Anti-Jewish Boycott Flares Up in Munich*, N.Y. TIMES, May 21, 1935, at 9. For an overview of this topic, see Jeffrey Herf, *Ideologies in Comparative Perspective: Reflections on Nazi Germany and the Pro-Slavery South* (2006) (unpublished manuscript, available at <http://www.yale.edu/glc/events/herf.pdf>).

64. Herf, *supra* note 63.

65. See, e.g., EDMUND BERGLER, *HOMOSEXUALITY: DISEASE, OR WAY OF LIFE?* (1956).

about lesbians and gay men—not everywhere, of course, but in many quarters in the United States.⁶⁶

This changed understanding of “facts,” however, does not necessarily result in the immediate eradication of bias. Instead, at least in some instances, courts and legislatures permit intuitions, unprovable assumptions, and even moral positions to do the justificatory work that was once accomplished by belief in the demonstrable deficiencies of the targeted group.

The current lack of credible facts to justify burdens on lesbians and gay men thus helps explain the contemporary invocations of intuition and morals by judges and lawyers who would sustain sexual orientation discrimination. These intuitions and moral commitments are actually the residual—though reframed—negative sentiments that were previously expressed as facts.

The second explanation for the relatively high concentration of intuition-based arguments in sexual orientation matters is more particular to the treatment of sexuality in society. Our own legal history shows Americans to be—or at least to have been—especially anxious about sexuality and sexual identity.⁶⁷ Indeed, just as gay people were beginning to publicly demand legal rights during the early 1970s, many governments responded by tightening prohibitions against sexual relations between same-sex partners.⁶⁸ In addition, even as popular sentiment was turning against laws that criminalized the sexual relations of consenting adults, the Supreme Court concluded, in 1986, that moral disapproval of homosexuality was sufficient to justify Georgia’s ban on oral and anal sex.⁶⁹ Recall that the Court reached this conclusion notwithstanding a long line of its own cases reinforcing that the Constitution’s privacy and liberty guarantees protect individuals’ most intimate, formative decisions.⁷⁰

Although the Court invalidated “sodomy” laws in 2003 as violating the Constitution’s liberty guarantee,⁷¹ the nearly twenty-year survival of *Bowers*

66. By contrast, myths that are styled as facts about transgender people are only now, and only in some communities, starting to be destabilized in this way. See generally Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle To Achieve Judicial And Legislative Equality For Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000).

67. See generally PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT (2000); DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994). See also Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth-Century America*, 16 COLUM. J. GENDER & L. 43, 44–45 (2007).

68. CAIN, *supra* note 67, at 36.

69. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

70. See *id.* at 199 (Blackmun, J., dissenting); see also *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

71. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

v. *Hardwick*⁷² in the wake of the sexual revolution, based on nothing more than presumed moral judgments, sharply illustrates the way in which discomfort related to sexual orientation has influenced the course of legal conversation. It should not be surprising, then, in light of this pervasive discomfort, that popular intuitions and moral commitments have played an especially strong role in shaping sexual orientation law and policy when similar arguments would have been disregarded in other regulatory contexts.

Once we recognize the particular leeway given to unprovable rationales, we can then begin to ask whether legal conversation can and should tolerate the relatively high concentration of intuition and morals-based rationales associated with sexuality-related restrictions. I hope you will join me, perhaps in my skepticism toward intuition as a sufficient rationale for government action, but at least in asking whether intuition, moral claims, and unprovable assumptions should be taken as seriously as they are in our contemporary legal conversations about the rights of lesbians and gay men.

72. 478 U.S. 186.